91-1998

(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1991

MICHAEL FIGURES and DR. JOSEPH MITCHELL, For Themselves and on Behalf of All Other Persons Similarly Situated,

Appellants,

and

PAUL CHARLES WESCH,

Plaintiff,

versus

GUY HUNT, Governor of Alabama, JAMES H. EVANS, BILLY JOE CAMP, Secretary of State of Alabama, LIONEL W. NOONAN, HARRY D'OLIVE, DEVON WIGGINS, OTHA LEE BIGGS, JERRY BOGAN, CLARENCE WATTERS, and TOM TURNER, Probate Judges, in their individual and official capacities,

Appellees.

On Appeal From The United States District Court For The Southern District of Alabama

JURISDICTIONAL STATEMENT

JOHN H. ENGLAND, JR.
England & Bivens, P.C.
2616 - 8th Street
Tuscaloosa AL 35401
(205) 759-5401

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN McDONALD
NEIL BRADLEY
MARY WYCKOFF
44 Forsyth St NW - Suite 202
Atlanta GA 30303
(404) 523-2721
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.

COUNSEL FOR APPELLANTS

QUESTION PRESENTED

WHETHER A DISTRICT COURT MAY REFUSE TO MODIFY ITS COURT-ORDERED PLAN FOR CONGRESSIONAL REAPPORTIONMENT TO CURE VIOLATIONS OF SECTION 5 OF THE VOTING RIGHTS ACT, AFTER THE ATTORNEY GENERAL OBJECTED ON THE MERITS TO A SIMILAR REAPPORTIONMENT PLAN ENACTED BY THE STATE LEGISLATURE.

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Rule 60(b), F.R.Civ.P. 4

Other Authority:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL FIGURES, et al., Appellants,

PAUL CHARLES WESCH, Plaintiff,

vs.

GUY HUNT, et al., Appellees.

OPINIONS BELOW

The final judgment, order and memorandum opinion of the three-judge panel of the United States District Court for the Southern District of Alabama adopting a congressional redistricting plan containing a single majority black district, is unreported and is reproduced in the separately bound appendix at 5a.

The order of April 2, 1992, denying appellants' motion to modify the remedial plan to cure the Section 5 objection entered by the Attorney General, is unreported and is reproduced at 184a.

JURISDICTION

This is an appeal from the orders of a three-judge district court adopting its own remedial plan, and refusing to modify that plan so as to cure violations of Section 5 of the Voting Rights Act as found by the Attorney General, 42 U.S.C. §1973c. The three-judge court was convened pursuant to 28 U.S.C. §2284(a), as this action challenged the constitutionality of the apportionment of congressional districts in Alabama. A final order was entered on March 9, 1992, and the order refusing to modify the plan was

entered on April 2, 1992. Appellants' notice of appeal was filed April 8, 1992 in the district court. 1a.

This Court is authorized to hear this appeal by 28 U.S.C. §1253 and 42 USC §1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The text of that section is reproduced at 230a.

STATEMENT OF THE CASE

On September 23, 1992, Paul Wesch brought this action seeking declaratory and injunctive relief against the Governor of Alabama, as well as other state officials, based on the malapportionment of the existing districting plan for congressional elections. On December 9, 1991, Michael Figures and Joseph Mitchell (Appellants herein), on behalf of a class of all qualified African-American electors in the state, were granted leave to intervene as parties plaintiff, asserting a violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

At the time the lawsuit was brought, the Alabama Legislature had adjourned its 1991 regular session without enacting a congressional redistricting plan, and the Governor, in his answer, indicated that he did not plan to call a special session for the purposes of redistricting. 140a. Accordingly, the three-judge court undertook to create an interim redistricting plan for the 1992 elections. The parties submitted six proposed redistricting plans, only one of which created two majority black districts, the Hilliard Plan. 141a-143a, 227a.

In the meantime, the Alabama Legislature reconvened and on March 5, 1992, adopted a congressional reapportionment plan which created a single majority black district (District 7 - 66.66% black population). The next day, March 6, 1992, Secretary of State Camp filed a motion asking the court to adopt the state's plan for purposes of the 1992 elections.

On March 9, 1992, the court denied Camps' motion and instead ordered into effect a modified version of one of the six proposed plans, the "Pierce Plan."[1] The plan, which is similar in many respects to that adopted by the legislature, created a single majority black district (District 7 - 67.53% black population).[2] A final judgment was entered that same day, enjoining defendants from failing to conduct the 1992 congressional elections in accordance with the court-ordered plan, unless the legislature's plan received preclearance no later than noon on March 27, 1992.
The judgment further provided that the court's plan would also be used "in calendar years after 1992" unless there was a precleared legislative plan in place at that time. 6a.

On March 11, 1992, the state submitted the legislature's plan to the Department of Justice for preclearance, in accordance with Section 5 of the Voting Rights Act. The Department of Justice, in response to the court's deadline, expedited consideration of the plan, and shortly before noon on March 27, 1992, interposed an objection to the legislature's redistricting plan. The basis of the objection was that the plan created only one majority black

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[1] Secretary of State Camp appealed that order to this court by Notice of Appeal dated March 13, 1992. The sole question presented in the jurisdictional statement was:

> Whether the three-judge court erred in denying appellant's motion to adopt a congressional redistricting plan enacted by the Alabama State Legislature and instead adopting a substantially different plan that, contrary to this Court's precedents, failed to adhere to the State Legislature's redistricting policies to the maximum extent possible?

Jurisdictional Statement, p. i., *Camp v. Wesch*, No. 91-1553.
On May 18, 1992, this Court summarily affirmed the three-judge court on that particular issue.

[2] To the extent that the plans differ, the legislature's plan is more favorable to minority voters. The court's plan includes a white congressional incumbent in the predominantly black district, while the legislative plan does not.

congressional district, despite the existence of alternative plans creating two majority black districts, thereby fragmenting concentrations of black population among several majority white districts. Specifically, the Attorney General found that:

> the fragmentation of black population concentrations outside of the one district with a black voting age population majority was unnecessary. Indeed, it is clear that at least the outlines of alternative plans that avoided such fragmentation were available or readily discernible by state officials and that such alternatives would provide for two Congressional districts with black voting age population majorities. These included plans with one district based on the black communities of Montgomery and Mobile Counties and the intervening and adjacent black-populated areas, and the other based upon the black popualtion of Jefferson County and southern Tuscaloosa County, together with black-populated areas to the south and west. Moreover, it appears that the elimination of this identified fragmentation would enhance the ability of black voters to elect representatives of their choice.

Letter from John R. Dunne, Assistant Attorney General of the Civil Rights Division of the U.S. Dept. of Justice to the Honorable Jimmy Evans, Attorney General of the State of Alabama (March 27, 1992)(Appendix 222a). By that same letter, the Attorney General precleared a change in the qualifying deadline, from April 3, 1992 to May 4, 1992. The district court was notified of the objection by Assistant Attorney General John Tanner. 226a.

Later that same day, Appellants filed a "Motion to Modify Court-Ordered Plan In Accordance With Section 5 Objection of Attorney General," pursuant to Rule 60(b), F.R.Civ.P., attaching a copy of the Letter of Objection. 174a.[3] Noting that the plan adopted by the court had only one majority black district, and

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[3] The Section 5 violation was not established until the Attorney General issued his letter of objection on April 27, 1992. Accordingly, the motion could not have been brought within the time to alter or amend the judgment under Rule 59(e).

therefore suffered from the same legal defect as that enacted by the legislature, Appellants requested an immediate evidentiary hearing at which the court's plan could be modified to cure the Voting Rights Act violation,[4] in time for qualifying to begin under the newly precleared schedule.

The court summarily denied the motion on April 2, 1992. 184a.

Appellants filed a Motion to Supplement the record on May 1, 1992, tendering the evidence which would have been presented, had the court held a hearing on their Motion to Modify. 185a to 220a. The evidence tendered included an alternative congressional reapportionment plan which created two majority black districts, one at 65% black population and the second at 56% black population, 191a, as well as declarations by the plan's author and Antonio Harrison,[5] explaining how the court's plan submerged and diluted black voting strength and how those deficiencies could be cured.[6] 213a and 216a. The motion was denied on May 20, 1992. 221a.

Appellants filed a notice of appeal on April 8, 1992. 1a.

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[4] Intervenors noted that there was already one plan before the court ("Hillard Plan," creating one district at 59.33% black population and a second at 61.98% black population, reproduced at Appendix 227a) which would cure the Attorney General's objection, and that a second alternative plan would be presented to the Court by Intervenors.

[5] Harrison testified at the trial in support of the "Hilliard Two" plan, which created two majority black districts at 59% and 61% black population.

[6] The declarations also compared the court's plan to the legislature's plan, and explained that both plans created a single majority black district by combining black concentrations in Brimingham and Montgomery. Both plans excluded the substantial black population (117,872 people) of Mobile County, placing it in a majority white district. 214a.

THE QUESTION PRESENTED IS SUBSTANTIAL

What is at issue in this case is whether a district court may disregard its duty to cure objections entered by the Attorney General, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, and thereby subvert the efficacy of the administrative preclearance requirement. While interim court-ordered plans are not themselves subject to Section 5 preclearance, this Court has plainly held, as Congress intended, that in fashioning such plans, a court must apply Section 5 standards. *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Upham v. Seamon*, 456 U.S. 37 (1982). *See also* S. Rep. No. 94-295, 94th Cong. 1st Sess. (1975). By refusing to modify its own racially flawed plan, when apprised of the objections raised by the Attorney General, the district court in this case circumvented and ignored the requirements of Section 5. Unless the decision is reversed, an objectionable Congressional reapportionment plan is likely to become the permanent plan for the decade, despite the prompt action of the Attorney General in entering an objection, thereby interfering with the Attorney General's responsibilities and denying minority voters their protected rights to equal participation.

I. IN REFUSING TO MODIFY ITS REMEDIAL PLAN TO CURE ESTABLISHED SECTION 5 DEFECTS, THE DISTRICT COURT COMMITTED PLAIN ERROR

It is well-settled that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Connor v. Finch*, 431 U.S. 407 (1977); *Chapman v. Meier*, 420 U.S. 1 (1975). However, this Court has recognized that "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation'...of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

Once a federal court embarks on that path, it is "held to stricter standards...than a state legislature." *Wise, supra*, citing *Connor v. Finch*. This is true because "the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). A court-ordered plan must be "free from any taint of arbitrariness or discrimination," *Connor v. Finch*, 431 U.S. at 415, quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964), and is subject to "special standards...of racial fairness," *Upham v. Seamon*, 456 U.S. 37, 39 (1982).

Perhaps the most important standard of racial fairness is compliance with the Voting Rights Act of 1965, 42 U.S.C. §1971, *et seq.* While a court-ordered plan is undoubtedly subject to the requirements of Section 2, *Edge v. Sumter County School District*, 773 F.2d 1509 (11th Cir. 1985), *Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss 1982), *vacated and remanded sub nom Brooks v. Winter*, 461 U.S. 921 (1983), it is equally well-established that Section 5's protections are applicable to interim court-ordered redistricting remedies. In 1975, when Congress extended the

protections of Section 5 of the Act through 1985,[7] it did so to "guarantee Federal protection of minority voting rights during the years that the post-census redistrictings will take place," S. Rep. No. 94-295, 94th Cong. 1st Sess., 19 (1975).[8] This Court found, in *McDaniel v. Sanchez*, 452 U.S. at 148 (1981), that Congress specifically intended that Section 5 apply not only to legislative plans, but also to court-ordered remedies as well:

> The Committee unambiguously stated that the statutory protections are to be available even when the redistricting is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation. The Committee Report is crystal clear on this point.

Id. Where, as in the instant case,

> the court, because of exigent circumstances, actually fashions a plan itself instead of relying on a plan presented by a litigant...the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.

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[7] In 1982, the Voting Rights Act was again amended and Section 5 was extended through 2007. Pub. L. No. 97-205, 96 Stat. 131.

[8] The fundamental role that Section 5 plays in protecting the rights of minority voters cannot be overstated. Section 5 was enacted to bring to an end "nearly a century of systematic resistance to the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). That provision, which shifts "the advantage of time and inertia from the perpetrators of the evil to its victims," replaced case-by-case litigation with remedies which "go into effect without any need for prior adjudication." *Id.* To permit a court to shirk its responsibility to apply Section 5 standards when fashioning an interim remedy would again reverse those burdens, forcing the victims of discrimination to file yet another lawsuit (under Section 2) to remedy the flaws in the court's plan.

Id., quoting from S.Rep. No. 94-295, *supra*, at 18. It is the district court's failure to do so that requires reversal.

The Attorney General, on March 27, 1992, found that the state's congressional reapportionment plan violated Section 5 of the Voting Rights Act. The basis of the objection was that the plan created only one majority black district (combining Montgomery and Birmingham), despite the existence of alternative plans creating two majority black districts, thereby fragmenting concentrations of black population (including Mobile County) among several majority white districts. 223a. The remedial plan adopted by the court used the same Birmingham/Montgomery configuration for its sole majority black district, similarly submerging and fragmenting black population concentrations. 214a.

The proper course for the district court to follow once apprised of the statutory flaws in a plan fragmenting concentrations of black population, as evidenced by the Attorney General's Section 5 objection, was to modify its own remedial plan to cure that Section 5 defect. *Upham v. Seamon, supra,* 456 U.S. at 42.[9] There was ample time to do so without delaying the June primary.[10] *See*

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[9] While it is true that the parties below stipulated that Section 2 of the Voting Rights Act, 42 U.S.C. §1973, required the creation of a majority black district that had at least 65% black population, 138a, that stipulation could not relieve the trial court of its obligation to cure the subsequent violation of Section 5 as found by the Attorney General. The parties have no authority to pre-empt the operation of Section 5.

It is not unusual for parties to agree (through, for example, a Consent Order) to the adoption of a particular plan, only to have the plan rejected by the Attorney General once it is submitted for preclearance under Section 5. The objection, once entered, supercedes any prior stipulations or findings, and must be cured.

[10] While this Court has on occasion "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal

Connor v. Johnson, 402 U.S. 690 (1971). Appellants filed their Motion to Cure on March 27, 1992, the same day the Attorney General notified the court of his Section 5 objection. At that time, five full weeks remained before the close of the extended candidate filing period (May 1, 1992).[11]

There were alternative plans readily available to the court which would have cured the objectionable features of the plan, i.e., the failure to create two majority black districts. The first, which was introduced at trial, was the Hilliard Plan, creating a 59% black district and a 62% black district. 227a. The second, tendered by Appellants in their Motion to Supplement the Record, created a 65% black district and a 56% black district. 191a. The court's refusal to take any curative action in the face of such serious racial dilution was plain error, in violation of the prior decisions of this Court, and warrants summary reversal.

Assuming, *arguendo*, that the court's refusal to modify its remedial plan was justified by the exigencies of the upcoming election, this Court should still summarily reverse and remand for curative action by the district court. The court's final judgment expressly requires that the court-ordered plan be used not just in the 1992 elections, but also "in calendar years after 1992" unless a legislative plan is precleared "in time for congressional elections to proceed without delay under then applicable state and federal law." 6a. While it is now too late to adopt a racially fair plan for the 1992 elections -- and Appellants do not seek to do so -- there is no basis for permitting any further use of the court's flawed remedial plan. *See, e.g., Connor v. Williams*, 404 U.S. 549, 551

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requirements, even constitutional requirements," that exception has been narrowly limited to those situations where "[n]ecessity has been the motivating factor." *Upham v. Seamon*, 456 U.S. 37, 44 (1982). No such necessity existed here.

[11] While qualifying was originally scheduled to close on April 3, 1992, that deadline was extended by the legislature until May 1, 1992. The change was precleared by the Attorney General in his letter of March 27, 1992. 222a.

(1972)["The prospective validity of the plan for the 1975 elections, absent legislative action, poses different issues..."]

Unless action is taken by this Court, the most likely scenario is that the objectionable one-district "interim" plan adopted by the court will remain in effect until the next reapportionment in 2002, effectively nullifying the Attorney General's objection and Section 5 itself. Under the terms of the Final Judgment, congressional elections in calendar years after 1992 shall be conducted in accordance with the court-ordered plan, unless the Alabama Legislature enacts a new plan and has it precleared in time for the next congressional elections. The anomolous result is that, under the order as written, compliance with the requirements of Section 5 will hinge on the *legislature*'s action or inaction. *Only if* the legislature enacts a new plan and submits it for preclearance will the Attorney General's objection be enforced, and a racially fair plan adopted. However, the legislature would have little or no incentive to revisit congressional reapportionment, a process that would be both contentious and gratuitous, in that it would have on impact on legislative redistricting, particularly now that the court's decision not to adopt the legislature's plan has been affirmed.[12]

If Section 5 standards are to have any meaning, this Court must enforce its prior decisions, requiring district courts, when fashioning their own plans, to "follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel v. Sanchez*, 452 U.S. at 148, quoting from S.Rep. No. 94-295, *supra*, at 18. Summary reversal is appropriate.

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[12] *See, e.g., S.C. State Conference of Branches of the N.A.A.C.P. v. Riley*, 533 F. Supp. 1178 (D.S.C.1982), in which a 1982 court-ordered congressional redistricting plan remained in effect until after the 1990 census.

II. ON REMAND, THE DISTRICT COURT SHOULD ADOPT THE LEGISLATURE'S PLAN AND MAKE ALL NECESSARY MODIFICATIONS TO CURE THE SECTION 5 VIOLATIONS

Whenever possible, a federal district court should follow the policies and preferences of the state, as expressed in the reapportionment plans proposed by the state legislature, including plans for congressional reapportionment. *White v. Weiser*, 412 U.S. 783, 795 (1973). While this Court has affirmed the district court's decision to implement its own plan for the 1992 elections, rather than adopting that enacted by the legislature, there is no basis for any further use of the court's plan.

The legislature duly adopted a plan for the reapportionment of the state's congressional districts on March 5, 1992, over the Governor's veto. The plan was submitted for preclearance, and on March 27, 1992, the Attorney General objected, finding that the state's failure to create two majority black districts unnecessarily fragmented black population concentrations. That plan is entitled to judicial deference to the extent that it complies with the constitutional and statutory to which such plans are subject. *Upham v. Seamon, supra,* 456 U.S. at 42, citing *White v. Weiser, supra,* 412 U.S. at 797. While much of the state's plan, like the court's plan, is objectionable (and therefore unenforceable) because of its failure to create two majority black districts, not all policy choices made by the state are similarly flawed. Among the relevant differences between the two plans is the absence, in the state's plan, of a white incumbent in the new minority district. The court is obligated to follow such policy decisions, *White v. Weiser, supra,* particularly where (as here) the court's choice adversely affects protected minority voters.

Accordingly, on remand, the district court should be ordered to adopt the plan enacted by the Alabama legislature, making such modifications as it finds are necessary to cure the Section 5 violations set out in the Attorney General's letter of March 27,

1992.[13] In the alternative, the court should, on remand, make all necessary modifications to its own remedial plan to cure the Section 5 deficiencies as found by the Attorney General.

CONCLUSION

The district court, in refusing to modify its reapportionment plan to cure the objection entered by the Attorney General, circumvented and ignored the requirements of Section 5 of the Voting Rights Act, in violation of clearly established law. Summary reversal is appropriate.

On remand, the district court should be instructed to adopt the legislature's plan, and to make all modifications necessary to cure the Section 5 violation as found by the Attorney General. In the alternative, the district court should be required to modify its own remedial plan so as to cure the existing violations of Section 5.

Respectfully submitted,

JOHN H. ENGLAND, JR.
England & Bivens, P.C.
2616 - 8th Street
Tuscaloosa AL 35401
(205) 759-5401

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[13] Contrary to the suggestion of Governor Hunt in his Motion to Dismiss or Affirm in *Camp v. Wesch,* No. 91-1553, it is possible to modify the legislature's plan to satisfy the Justice Depart- ment's objections. While it is true that the objection, which requires the creation of a second majority black congressional district, would require substantial revisions of that plan, the changes would be no more substantial than those required to modify the court's own interim plan. Both the court's plan and the legislature's plan create only one majority black district, and fragment black population concentrations in Mobile, Macon, Bulloch, Lowndes, Dallas and Wilcox Counties. 214a.

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN McDONALD
NEIL BRADLEY
MARY WYCKOFF
44 Forsyth St NW - Suite 202
Atlanta GA 30303
(404) 523-2721
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.

COUNSEL FOR APPELLANTS